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## EXPERT TESTIMONY.

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THE assumption that an expert, when called upon to stand in the witness-box and give judge and jury the benefit of his peculiar knowledge, is entitled to more than the ordinary witness-fee—to the same pay that he would receive for imparting the same information to a private person or firm, for commercial purposes—rests, it seems to me, upon an entirely erroneous conception as to his status in court. It supposes him to be there as an employé; like, for instance, a carpenter who might be called in to mend a broken bench, if an alderman were suddenly elevated to a judgeship, and who would demand and receive the ruling rate per diem for carpenter work. Instead of being there as an employé of the court, the expert should be there as a subject of taxation, and entitled to no pay at all, save the usual witness-fee, which, properly speaking, is not pay.

When a business man, whose time may be worth fifty dollars a day, is called to testify as a witness or sit as a juror, it is nonsense to speak of the trifle which he receives as pay. It is not pay, and is not intended to be. The whole matter of compulsory service of jurors and attendance of witnesses rests upon the theory that it is for the furtherance of justice and the good of the community, and therefore the government has a right to claim it without pay. It is a species of tax, which falls now here and now there, as circumstances or lot may determine, and it behooves every good citizen to meet it cheerfully, for to-morrow his townsmen may be called upon to pay the same tax on his account.

No species of taxation has ever been devised, and probably none ever can be, which is absolutely equitable in its working; and this is as nearly so as some others—as nearly so as the circumstances will permit. When we have an income-tax, it is assumed that every prosperous person is able to part with a

certain percentage of his income, for the benefit of the government. But incomes below a certain amount are exempted, because the exaction of the tax from these would work hardship. The income-tax law passed by Congress twenty years ago assumed that every citizen who was in receipt of more than six hundred dollars a year could afford to give five per cent. of the excess for the support of the government and payment of the public debt, and that those who were in receipt of less than six hundred dollars could not afford to contribute anything at all.

On precisely the same principle, it is assumed that a prosperous man can afford to go into court now and then, when circumstances make it necessary, and spend an hour or a day in furthering the ends of justice. But we may have to call in a man so poor that the loss of a day, or even an hour, from his usual occupation, would work hardship. In his case, the fee is equivalent to a remission of the tax. The fees are not intended as pay for the prosperous, but only as protection for the poor.

The analogy to the income-tax fails in one respect. The tax for service in court is liable to fall frequently and heavily upon some, and lightly, or not at all, upon others. In this respect it is like the blood-tax of war. When the government encounters difficulties that can only be solved by the shedding of blood, the equitable thing would be to sacrifice a finger of each man in the country. But as this is impracticable, the government, when volunteers are wanting, resorts to conscription, selecting men by lot, with the knowledge that some will be killed, others will have limbs shot off, others will be scarred and crippled for life, and still others will escape all casualties and perhaps win rank and fame. When it musters these conscripts, it does not say to a book-keeper, You have been receiving a salary of two hundred dollars a month, therefore your pay as a soldier shall be two hundred dollars a month; to an engraver, You have been earning thirty dollars a week, therefore your pay shall be thirty dollars a week; to a plumber, You have received four dollars a day, therefore you shall still receive four dollars a day;—and so on, through the list. Instead of this, it assumes that when the country is in peril, each citizen can afford to spend a few weeks, or months, in its service; and the more he earns at his business, the more he can afford (in precisely that ratio) to be taxed. But in the case of a poor man, whose family cannot spare his earnings for even a day, this would work hardship; so a uniform

rate of pay is fixed, which is just about equal to the wages of a day-laborer. In other words, to the day-laborer the tax is remitted. The same principle is observed when property constituting the tools of a man's trade is exempted from taxation, and when a gold watch is taxed and a silver one exempted.

So if a millionaire and a hod-carrier should both be witnesses to a matter that became the subject of litigation, both would be called into court. Their testimony might occupy time that to the hod-carrier was worth half a dollar, and to the millionaire a thousand dollars; and each would receive fifty cents. It is a mistake to suppose they have been paid. They have been taxed *pro rata* according to the value of their time; but to the hod-carrier the tax has been remitted. The same is true of the men in the jury-box. One may be a journeyman blacksmith whose wages are two dollars a day, and another a man whose business will suffer three hundred dollars for every day that he sits as a jurymen. Yet each receives two dollars a day, and no more. An incidental advantage of this system is, that such fees are too small ever to act as a bribe.

But of late years, a new kind of witness — the expert — has risen to prominence, who holds himself to be a professional employé when called into court, and entitled to pay accordingly. And this claim has been allowed, with the result that might have been expected. We can call a business or professional man into court, put him into the box as an ordinary witness, use up a hundred dollars' worth of his time, and give him fifty cents; but if in the same case the ends of justice require that an expert stand in the same box and contribute a hundred dollars' worth of his knowledge, he wants a hundred dollars for it. I fail to discover any fact or principle on which the distinction can be based. Indeed, if there is any argument at all for a distinction, it lies the other way; for time thus used up can never be recovered, but knowledge thus imparted still remains with him who imparted it. A physician who follows the code in refusing to patent an invention, on the ground that it should be contributed to the cause of humanity, contradicts himself when he goes into court as a witness and demands pay for a professional opinion.

That the expert is paid by the side which calls him, and not by the court, does not make the matter any better, but rather worse. It at once raises the presumption that the side having

the more money will pay the higher price for expert testimony ; and thus the practice establishes a standing bribe. Whether it is for this reason, or because the honest opinions of experts in critical cases are untrustworthy, it is not necessary to say ; but one or the other of these theories must be called in, to account for the fact that, in almost every case where expert testimony is introduced, the experts are called by both sides and swear point blank against each other. Expert testimony ought to rank high among the influences that determine verdicts ; but, under the present system, its actual net result is almost nothing. With its continuance, the courts must soon be called upon to determine a line marking the boundary where ordinary testimony ends and expert testimony begins ; and this it will be found exceedingly difficult to do. Suppose, for instance, a cause were on trial whose merits were mainly to be determined by the facts of a runaway ; and suppose a man who had seen it were called to the stand and asked whether the driver exhibited skill or the want of it, whether the team was vicious or not—in short, whether the disaster was the fault of the driver or of the team. And suppose he should answer : “I have been accustomed to horses all my life ; I have made their character and their management a study ; I am an expert on that subject ; and if the court wants my testimony, deriving its value from long years of experience and observation, it should pay me as an expert.” Wherein would his claim differ from that of the alienist, the chemist, and the chirographer ? But if it were admitted, where would the line of experts end ?

If I have shown that the calling of experts as of other witnesses finds, for every essential feature, an analogy in some recognized species of taxation, it follows that they should be reduced to the standing of other witnesses, or the whole taxation plan should be abolished, and all witnesses and jurors should be paid the true value of their time. This might be theoretically the more equitable as regards the individuals immediately concerned ; but, besides being impracticable, it would, in a larger sense, work injustice by making justice too dear. It is infinitely more important that true verdicts be attainable at reasonable cost, than that men called as witnesses and jurors be relieved of the burden of this casual tax. Indeed, the great difficulty with the law courts now is, not that many verdicts are false, but that a litigant who may prove to be clearly in the right, can only obtain

his vindication or his dues at enormous expense. Franklin's whistle was a most excellent whistle — there was no fault to be found with it as such, and to a boy a whistle was desirable ; but it cost too much. If a man seeking his rights in court had to pay not only his lawyers, but all his witnesses, as experts are paid, we should soon come round again to the days when the son of Pethuel exclaimed : " That which the canker-worm hath left, hath the caterpillar eaten ! "

If we could get rid of the idea that an expert in court is an employé ; if we could treat him on the principle that the court which has a right to tax one man's time for the ends of justice, has precisely the same right to tax another man's knowledge ; if we could make all payment for expert testimony punishable as bribery, — we might then feel certain that all such testimony was honest, or at least that it was liable only to be impaired by the unavoidable elements of professional pride and jealousy. And if after that it continued to cancel itself by its contradictions, its use might be done away with. How much the value of expert testimony may be diminished by the consideration that the expert is called upon mainly for opinions, while the ordinary witness is rigidly confined to facts, can perhaps only be determined by experience, after the disturbing elements which I have been discussing are cleared away. It is desirable that every cause of suspicion against the expert be removed ; for some men's opinions are worth more than other men's facts.

ROSSITER JOHNSON.

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How shall we improve the character of medical expert testimony ? Some advise dispensing with experts altogether ; others, conscious that law, staggering beneath the weight of its precedents, may still learn something from science, hold the remedy to be, not the abolition of the expert, but a reduction in the scale of his compensation. The value of a man's time exempts neither from jury duty nor from testifying as a common witness. An income-tax and military service, admitted to be hardships to individuals, afford an argument from analogy for refusing any special compensation for expert testimony. If the state can tax her citizens unequally, cannot justice do as much with her experts ?

"Wrest once the law to your authority ;  
To do a great right, do a little wrong."

The argument, good for demanding the services, is weak for withholding the pay. It seems to me that those who advocate refusing the expert his fee in order to improve his testimony, which may be properly denominated the cheese-paring method of justice, have overlooked their strongest argument and most striking analogy, which is found in the fact that the world has always starved its geniuses to heighten their brilliancy.

That the lawyer, accustomed to say with Pistol,

“Why, then the world’s mine oyster,  
Which I with sword will open,”

should think that the same even-handed justice which presents a shell to each litigant and the oyster to himself would require the professional man to come into court, compel him to testify to hypothetical scientific absurdities propounded by the lawyers, and dismiss him after some days’ detention with nothing for his services, is not singular, for if recent decisions have confirmed the truth of the adage that the venerable goddess is blind, it is not strange that her votaries should be myopic. The argument, that justice does not take into account the value of a man’s time when she calls him as a witness; that banker and hod-carrier are alike liable to be summoned, and receive the same fee, and that therefore the compensation of the expert witness should be the same — just as the laborers in the vineyard received every man his penny — is fallacious, and founded on an ambiguous use of the word “witness.” The medical man is as liable to be summoned to testify to some fact coming under his own observation as the banker or hod-carrier, and for this should receive the same fee. But in what sense is the expert who explains to the court the meaning of certain scientific facts a witness? Does the interpreter who translates the testimony of a Spaniard in one of our courts become a witness in the ordinary sense, simply because he is sworn to speak the truth in translating? He is properly an employé of the court that calls him, a sworn official and paid as such. Sworn interpreter of science to the court — that is the position which the medical expert occupies. To illustrate: stained garments are placed in his hands to decide the significance of those stains by scientific tests. His chemical reagents show them to be blood-stains. But to leave the matter here might be to utter a falsehood in the name of science. He examines with the

microscope and testifies that the size and shape of the corpuscles prove it to be the blood of a fish or reptile; that it cannot be the blood of a mammalian. He does not connect those garments with the prisoner, has nothing to do with the relation of that blood to the guilt or innocence of the accused; by scientific processes he interprets for the court the nature of those discolorations. As a witness he has added not a single fact to the record, but simply made legible what was written in blood on that clothing—a legend which, left unread, might have proved for the prisoner as damning and difficult of removal as the spot on Lady Macbeth's hand.

To say that the expert may misinterpret the characters of his science does not affect the argument. Physicians are called as medical experts because, by reason of their studies and experience, they are deemed best fitted to translate to the jury the language of disease, and when employed as sworn interpreters they should receive such compensation for their services as the court deems just and reasonable. This is the only tenable view. If the court may call a physician from his practice, not because the facts of the case are matters of his personal knowledge, but because the medical questions involved are of his every-day experience, and, after a hard trial on the witness stand, may dismiss him with the penny of the ordinary witness, what shall prevent the judge from calling the same expert to-morrow, occupying his day and dismissing as before? Indeed, since he happens to be a physician of wide practice, thoroughly informed in his profession, and now quite at home as a witness, why may not the court pay him the compliment of a summons the next day, and the next—in short, keep him pretty constantly in attendance as a handy man whose testimony is “strictly first-class and offered at a tremendous sacrifice”? Well might that physician, at the end of the term, looking at his pennies, say with the Preacher, “As it happeneth to the fool, so it happeneth even to me; and why was I then more wise?”

What does the lawyer see in the medical expert? A person privileged to substitute opinions for facts, and therefore valuable. *Amicus curiæ* professedly, though called by opposing counsel rather than by the judge; answering alternately yes and no to contradictory hypothetical questions, ingeniously based on selected facts in the testimony; and so, with a show of science falsely so called, leaving the jury more befogged than ever. If

this is a fair view of the medical expert of our time, well may justice exclaim, *Non tali auxilio . . . tempus eget.*

True, science asks a different definition from this, and from such judgment, indignant, takes an appeal.

Amidst the multitudinous babble of men, words spoken at the end of the journey of life impress us, sometimes simply because they are the last, now and then because in those words the mind, closing its tablets on going elsewhere, sums up its life record. The late Dr. Wilbur, of Syracuse, N. Y., a vigorous thinker and able writer on topics of social science, was a leading expert in his specialty. Only a few hours before his death, his mind being then in full vigor and all unconscious of the falling shadow, he penned these words: "Expert testimony should be the colorless light of science brought to bear upon any case where it is summoned. It should be impartial, unprejudiced. There should be no half truths uttered, and suppression of the whole truth is in the nature of false testimony."

I have nowhere found, in concise form, a better statement of what expert testimony should be than in those words. The colorless light undistorted by the medium is what we want. The expert medical witness should be *amicus curiæ*, interpreting to court and jury the relation of medical science to the case. He does not determine the truth of the testimony, but shows to the jury the scientific value they must give to those statements if they believe them to be facts; their value in medicine, not in law, for there the judge asks no advice, and the witness is not competent. The expert must be a thorough master of his science; should be one in whom the judge has confidence, and wholly impartial. To insure this he should be called by the court, and not in the interest of either party. To a true expert in that independent, responsible position the utterance of half truths, or the suppression of any portion of the truth, should be simply impossible.

In this way, I think, and not by reducing the expert to the position of the ordinary witness, may we elevate his testimony. Such an expert, standing in judicial impartiality, would trample under his feet all motives of expediency, all mere personal considerations, and so make medical expert testimony harmonious with science and respected in court beyond the discordant voices of to-day. And yet I believe that there are medical experts, even now, who have stood for science in the furnace blast

of the breath of popular indignation and have not felt the heat; men who, in the line of professional integrity, would not swerve one hair's breadth from their convictions of right, even though they walked over hot plowshares in following truth.

W. W. GODDING.

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THE writer has frequently been called upon to testify as an expert in suits at law. In most of them mechanical patents were the subjects of controversy. During this experience one conclusion has been reached, and has become more and more firmly established. It is that the course now followed, of calling experts to testify on both sides of a case, is an admirable method of reaching the truth as regards the scientific aspects of the question at issue.

Mr. Johnson attacks the present system of retaining experts. His argument is that, as they testify under oath as witnesses in court, they should be subject to all the laws affecting witnesses. He thinks that they should be subject to subpœna and should receive no special compensation for devoting their time to elucidating the scientific aspects of a case. He declares himself unable to draw a distinction between the position occupied by an expert and that occupied by an ordinary witness. There is, however, a radical difference between the two.

Ordinary witnesses are summoned to disclose facts that have come within their knowledge or observation in every-day life. The expert is called upon as *amicus curiæ* to give the court the benefit of recondite knowledge acquired by years of study. To make such knowledge of use in any given case, the facts and questions at issue have to be studied. The expert's testimony is the result of his professional information applied to the case after special study of it. It is clear that he is doing professional work in giving such testimony and is entitled to the compensation usually allowed for such work. Comparing the expert with the carpenter, it follows that if the expert were liable to subpœna in his professional capacity, then too the carpenter should be. The court would have the same right to force the one to give out his professional knowledge as to compel the other to repair its broken benches.

The expert witness and the business man who is compelled to give his time to the service of justice stand on distinct footings.

The merchant knows personally of some ordinary facts that must be disclosed by him personally for the furtherance of the ends of justice. It may, and probably will, be only once in his life that he has to do it. His loss of fifty dollars' worth of time will represent his life's contribution to this part of his country's service. In the case of the expert the necessity of personal service disappears, because he is one of a limited class, any member of which is available. The merchant represents no class, but appears as a citizen. His testimony is only of value in the one suit. The poorest laborer is as competent a witness when his turn comes. The expert is one of a small number of specialists whose services are of value in a large number of suits. His position in this class has been won by the study of a special science, a special art, or a special branch of knowledge. If he were compelled to give his knowledge for the benefit of any suitor, there would be danger that his time would be entirely devoted to giving testimony. In the lecture room a scientist who has won distinction can obtain a fee of from one hundred dollars upward for a lecture of an hour's duration. Nothing more ruinous to so unfortunately gifted an individual could be conceived than a liability to compulsory service in his capacity as a master of professional knowledge. Under such a condition of things his only way of avoiding perpetual unrecompensed work in the courts would be to conceal his acquirements. A most burdensome tax would be laid upon scientific workers. This is an emphatic *reductio ad absurdum* of the proposition.

The comparison between service in war and service as witness is a just one, as far as ordinary witnesses are concerned, for the tax falls upon the whole community at random. In the case of experts the comparison fails. To make them liable to compulsory service as expert witnesses would cause a discrimination against them in the distribution of the witness tax. They would be repeatedly called upon. Their position would be like that which would be occupied by members of athletic clubs, were proficiency in gymnastics to render a man more liable to conscription.

The course followed in taking expert testimony is consistent. If the suit is one to restrain infringement of a patent, the complainant sues upon his patent. The expert has the patent put in his hands; its validity holds good until the court pronounces against it. The *prima facie* testimony refers to the pat-

ent as it stands with only a general reference to the state of the art. It is defined and explained from this point of view, and the infringement under this broad interpretation of the patent is pointed out. In this testimony the patent, from the circumstances of the case, is at its strongest, as it is unattacked and its scope not closely limited. The defendant's expert follows in the answering proofs, giving his testimony against the infringement. He collates all the limiting or anticipating devices and patents that have been produced by the defense. His view of the case in the light of all this evidence is then given. This view inevitably differs from that of the complainant's expert, as additional references are considered in it. He limits the claims of the patentee by showing in what respects they are invalid, and points out how the views of the first expert are affected by the new matter. The complainant's expert later testifies in rebuttal. He analyzes the opposing testimony, examines and limits or disproves the applicability of the citations and references contained in it, and gives his final view of the case. Both witnesses are subject to a rigid cross-examination. They have but one duty to perform. It is to tell a strictly truthful story in their direct examination. They then are prepared for the cross-examination with all its imaginary terrors.

It rarely happens that a case at law is so clear as to have only one side. Lawyers are repeatedly asked by what rule they feel at liberty to take up either side of a suit indifferently. It as seldom happens in scientific questions affecting patents as in legal ones that one side has all the right. In the latter case as in the former both parties are entitled to representation. No fairer way could be devised than the present method of giving the opposite views through the testimony of sworn experts. In not one case out of a hundred that goes on the complainant's part beyond the *prima facie* plea, or in which the defendant takes answering proofs, can an expert affirm positively that there is nothing to be said on the opposite side.

Human justice and its methods are not exempt from error. The perfect court would be the tribunal of the arbitrator. But the same imperfections of human nature that cause disputes make the cumbrous machinery of the courts necessary for their settlement. Each side of the case is presented by a hired advocate, and it would be as sensible to subpoena lawyers to serve as counsel, as to force experts to study cases and testify concerning the

results of their study on the demand of any interested party. The lawyer and the expert, working together, conduct searches, study the patent and the alleged infringement, and frame a consistent theory of offense or defense. The expert is expected to give as witness a straightforward statement of the case, and to sustain it on cross-examination. If before beginning his testimony he finds that he cannot conscientiously testify in favor of the side retaining him, it is his duty to withdraw. But the subject of patents is so complicated that this will seldom happen. The expert, of course, should hold himself above direct advocacy. If he does so, his standing will be higher in the eyes of lawyers and judges; experience has shown that experts of high personal character win the highest regard of both. Repeated decisions of the courts, in which expert testimony is quoted and made the basis of decisions, show how favorably they regard it. These facts are the best commentary on the excellence of the system.

T. O'CONOR SLOANE.

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THE Doctor in the witness-box: this is a phenomenon of the present century; not exactly one of the great land-marks of civilization, but a minor sign of the times, and an evidence that science is expanding and human affairs becoming more complex. The evolution of the medical expert has accompanied especially the immense progress that has been made in the study of mental diseases, in toxicology, and in the building of railroads.

George III. made insanity respectable, Pinel made it tolerable to bear. Before their time insanity was thought to be a horrible and degrading possession, and its victims were treated with brutality and ignorance; naturally, therefore, no one was admitted to be suffering from it who could possibly be thought sane. But during the present century, the view that insanity is a disease of the brain, and that insane people are sick people, has been gradually extending, until now the question of a man's sanity is raised the moment he does anything that is eccentric, disappointing, or criminal. The sentimental cry of Rousseau, that all bad men are only men with peculiar but natural instincts, finds its echo in the saying of Dr. Holmes, that all bad men should be treated as sick men, and in the conclusions of Professor Benedict, who asserts that criminals simply constitute an interesting though disturbing anthropological species.

Nothing need be said to illustrate the well-known fact that chemistry can now detect, with almost absolute certainty, the poisons which are given to destroy life, and that crime may be checkmated or avenged by the investigations of the toxicologist. Nor is it surprising that railroads, with their wealth and the inevitable percentage of accidents, should have developed a special medical literature, and a special class of medical experts. But, although science has now woven itself into every detail of human affairs, it is a notable fact that the evidence of experts in medical sciences has continually lost ground, until to-day its inconsequential nature, and meager value in helping the ends of justice, are universally acknowledged. One naturally looks for the cause. When a man of business is about to initiate some new project, he calls in the best advisers possible, gets from them facts and opinions, and makes his decision accordingly. But when a court of justice wishes light upon intricate and difficult points, it follows no such common-sense procedure. It calls in two antagonistic sets of advisers concerning none of whom it has any assurance of special skill. The first set urges one view, the other set its opposite. The lawyers try to prove that both groups of advisers know nothing at all about the matter. In fine, the court accepts any one as an expert, and trusts that cross-questioning will show that he is an ignoramus, if he really is such. Now, since there is no certainty that real experts have been called upon either side, or that the lawyers will prove non-expertness if it exists, or that the witnesses will not testify for the side which calls them, justice truly has a meager chance. It is very plain from this, that in the matter of medical expert testimony it is the mode of procedure which is at fault, and not the doctors, who, however, generally get all the blame.

The law in this country presumes that every physician is an expert in insanity and in surgical and medical cases. It even accepts the opinions of medical students, unlicensed practitioners, nurses, and midwives. Everything from these sources, say our learned judges, is relevant, and they trust to the cross-examination to show its real importance. There are many reasons for believing that this practice in law is an unwise one, especially in our country. The medical profession in America, from whom experts are thus drawn, is a body of extremely mixed character, and is, as a whole, much more irresponsible, ignorant, and untrained than that of any other of the great

nations. The country is full of small medical colleges, where boys and men of the most deficient education, after practically about two years of study, are graduated and licensed. The States, as a rule, require no evidence of character or special fitness in those who are to undertake the care of human lives, or are to be summoned officially as the advisers of justice. Medical jurisprudence is scarcely taught at all, and the chances are, if any doctor is called to the witness-stand, that he brings with him not only the prejudices of a defective education, but great ignorance of legal procedure.

Yet this is only the worse side of the American doctor. In practical skill, after he has made up for deficient education by experimental studies upon his earlier patients, he equals his European brethren. He is progressive, observant, earnest and remarkably apt in the medical art. Besides — and this is a fact which helps to solve the difficulty regarding medical testimony — there are now among American physicians plenty of gentlemen who take the highest rank in scientific medicine, men whose opinions upon surgery, medicine, insanity, and toxicology are as valuable as any that could be got in Europe. Why should courts, therefore, accept the *ignoramus* if they can get the expert?

I am aware that the judges themselves are hardly to blame because they admit any one upon the witness-stand who has a *prima facie* right to be thought an expert. They cannot easily decide as to who are competent, although, with the memory of the Schœppe and Wharton cases still before us, it may be suggested that they have not always done all that was possible. But aside from this, our judges who condemn so severely the medical expert are themselves not entirely above criticism. Scientific men, in whatever branch, are accustomed to test conclusions by submitting them to the critical opinion of the specialists in their science. Text-books represent the general consensus of opinion upon these special sciences. Yet in cases of poisoning, a single presuming chemist can emit an opinion totally at variance with the received authorities of the world, and the opposing side cannot in the least impair his testimony by quoting standard works against him. Here certainly judicial decisions cripple the genuine expert and furnish a loop-hole for the guilty to escape. And our learned and critical judges have not lacked wisdom in this respect alone. So far as insanity is

concerned, the decisions of the bench have placed the medical expert in a false position, and one in which it is almost impossible that he should be a helpful adviser and friend of the court.

If a man commits a crime and pleads insanity, the law tries to prove that he was or was not "conscious at the time of his act, of its nature and consequences." Upon this knowledge as to whether the act was right or wrong depends, according to most judicial decisions, the question of sanity and responsibility. But medical men are now taught, and alienists universally affirm, that this question of right or wrong is not the material one, and that the real issue is, Was the act the result of brain-disease affecting the mind? The doctor may, therefore, be compelled to give testimony which he knows is entirely irrelevant. He wishes to prove one thing, the lawyer another. Insanity trials will never be satisfactorily conducted until this anomalous state of things is changed. The legal test of insanity is a false one. Though enunciated in the nineteenth century, it is really a mediævalism. It has the whole weight of an undivided scientific opinion against it, and it must go.

Yet it may be proper to say that the alienist's test of responsibility, which is now being urged as a substitute for the present legal one, is not the one, I think, which will be accepted by the courts of the future. "Is a man insane? Then he is irresponsible and should not be punished," is a formula to which medical jurists may bow, but not those who look from a wider stand-point upon human affairs. The term "insanity" has become extremely comprehensive. It includes the victims of degenerated brains, the tainted products of unhealthy ancestors, as well as those suffering from disease. It would, indeed, surprise our medical fathers to see how glibly, and correctly too, the modern alienist pronounces his patients insane. Now, when a man commits a crime and is pronounced insane, the technical question of responsibility should not follow, but rather that of treatment. Do the best interests of society demand his punishment, or simply therapeutic applications? Shall he be hanged or imprisoned, or ought he only to be committed to an asylum and given aloes and cod-liver oil? In criminal insanity trials there should thus be the question as to mental disease, which is a medical one, and the question of treatment, which is a sociological one.

A word finally as to remedies. It hardly seems necessary to say that the non-payment of experts would accomplish no reform.

If the courts do not pay for experts, they will not get them ; nor has government a right to take gratis from a man that special skill by which he gets his living.

Our political system would hardly tolerate the inquisitorial methods adopted in France and Germany, by which the whole question is referred to a Board of Experts, who report without being subjected to cross-questioning. Americans do not like to have matters settled so perfunctorily, and the peculiarities of our political institutions make it doubtful whether competent Boards of Governmental Experts could be secured. There should be, however, in each State a certain considerable number of medical men whose reputation, experience, and skill would entitle them to be called upon as experts. They should be called to give their evidence by the court, and not by the opposing counsel.

CHARLES L. DANA.